



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaints by Maurice Commanda dated April 16, 1997 alleging discrimination in employment because of race, ancestry, colour and marital status; by Bernie Commanda and Robert Commanda dated April 18, 1997 and April 25, 1997, respectively, alleging discrimination in employment because of race, ancestry, colour and family status; and by John Goulais, Doug Chevrier and Gilbert Anishnabie dated April 17, 1997, April 20, 1997 and April 23, 1997, respectively, alleging discrimination in employment because of race, ancestry and colour.

B E T W E E N :

Ontario Human Rights Commission

- and -

Maurice Commanda, John Goulais, Bernie Commanda,
Robert Commanda, Doug Chevrier, and Gilbert Anishnabie

Complainants

- and -

Rainbow Concrete Industries Ltd., Boris Naneff and Jack Myers

Respondents

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : January 25, 2002

Board File No: BI-0305-00 to 0310-00

Decision No : 02-002

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission)	
)	William Holder
)	

Rainbow Concrete Industries Ltd., Boris Naneff and Jack Myers)	Geoff Jeffrey
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INTRODUCTION

The six Complainants are all native Canadians. They are former employees of the Corporate Respondent, Rainbow Concrete Industries Ltd. ("Rainbow" or "the Corporate Respondent"). All of Rainbow's employees were laid off effective October 25, 1996. Unlike other of the Corporate Respondent's employees, the Complainants were never recalled to work. The Complaints allege that non-native employees were recalled, and that the failure to recall the Complainants constitutes unlawful discrimination on the basis of race, colour and ancestry contrary to the *Human Rights Code*, R.S.O.1990, c. H. 19 as amended ("the *Code*"). All of the Complaints name Rainbow and its Vice-President, Boris Naneff ("Naneff") as respondents. The Complaint of Robert Commanda also names Jack Myers ("Myers") as a respondent. The Respondents contend that the decision not to recall the Complainants was made without regard to their ancestry. Their stated rationale for not recalling each Complainant is specifically set out below in this decision.

The Board notes that the parties have consented to having the Board amend the Complaint of Maurice Commanda to add the ground of discrimination on the basis of marital status, and the Complaints of Bernie Commanda and Robert Commanda to add the ground of discrimination on the basis of family status. The Complaints are so amended.

THE ISSUE

This decision deals with the Respondents' preliminary motion in which they sought the following relief as set out in the Notice of Motion dated March 13, 2001:

1. An Order staying the proceedings against the Respondents;
2. In the alternative, an Order staying the proceedings against the individual respondents, Mr. Naneff and/or Mr. Myers;
3. An Order directing the Commission to give written reasons for its decision pursuant to section 36 of the *Human Rights Code*;
4. An Order requiring the complainants to provide full disclosure and particulars of the efforts made by them to secure alternate employment, or otherwise mitigate their alleged damages within a reasonable period prior to the hearing of this matter;

5. The Respondents [sic] costs; and,
6. Such further and other relief as the Respondents may request or this Board of Inquiry may deem just.

By the time the motion was heard on April 24 and 25, 2001, the Respondents had amended the above remedial requests.

The Board understands that the Commission has undertaken to provide the information sought pursuant to Paragraph 4 above. Consequently, that matter was not argued before the Board.

Additionally, the Commission advised that it would not oppose a motion to remove the Personal Respondents, Naneff and Myers, provided Respondents' counsel undertook to assure the Board and the parties that Naneff and Myers were acting within the scope of their employment at all times. Consequently, the plea for relief set out in paragraph 2 above was not specifically pursued before the Board. The Board notes that Respondents' Counsel has not yet provided the requested undertaking, nor has the Commission indicated that it would be willing to dispense with this undertaking. Consequently, the Board has not removed the Personal Respondents to the Complaints.

The Board heard no evidence or argument with respect to the request for costs set out in paragraph 5 above. As a result, this decision does not address that issue.

In his submissions on the motion, Respondents' Counsel altered his position somewhat with respect to the Commission's obligation to provide reasons. He did not take the position that the Board could order the Commission to provide reasons, but rather that the Commission's failure to provide reasons constituted an abuse of process.

Rather than seeking to have the Complaints stayed, at the hearing Respondents' Counsel relied on s. 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S. 22, as amended (the



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“*SPPA*”) and sought to have the Board dismiss them as constituting an abuse of process. That is the sole issue addressed in these reasons.

PARTICIPANTS

An oral hearing with respect to this motion was held on April 24 and 25, 2001.

The Respondents led evidence and made submissions in support of the motion.

The Commission opposed the motion. The Commission cross-examined Nanef and Myers and made legal submissions.

The Complainants’ counsel did not attend this hearing.

FURTHER SUBMISSIONS

Following the completion of the oral hearing into this matter, counsel for the Respondents wrote to the Board on June 4, 2001 to advise that Myers had passed away suddenly. By decision dated July 9, 2001, the Board directed the parties to set out their positions with respect to how the Board ought to proceed having regard to Myers’ death.

The Complainants advised the Board that they still did not wish to participate or make any submissions with respect to the Respondents’ abuse of process motion.

The Commission and the Respondents agreed that the Respondents would provide a supplementary affidavit from Nanef setting out how Myers’ death would impact on these proceedings, that the Commission would decide whether to cross-examine on that affidavit, and depending on that decision, that the oral hearing would either be reconvened or the Commission and the Respondents would simply provide the Board with written submissions. The

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Commission decided not to cross-examine Naneff, and the parties provided the Board with their further written submissions on October 19, 24 and 31, 2001.

DECISION

By Registrar's letter dated November 23, 2001, the Board advised the parties that "the Board has dismissed the Respondents' motion. Written reasons will follow."

These are the Board's written reasons.

THE FACTS

(a) Evidence relied on

The following recitation of the facts is based on the Board's review of the Complaints, the pleadings, the documents brief submitted by the Commission, and the testimony and affidavits of Naneff and Myers. The Board appreciates that some of this evidence may be disputed at the subsequent hearing into the merits of these Complaints, but accepts it as correct for the purposes of disposing of this motion. The central factual question before the Board is whether evidence once available to the Respondents to defend against these Complaints has been "lost" or its quality compromised as a consequence of the passage of time.

(b) Layoff and Recall

Rainbow operated a cement plant on land owned by the Garden Village First Nation outside of North Bay, Ontario. In the fall of 1996 a dispute arose between the Band Council and Rainbow with respect to rent. Rainbow's access to the plant was blocked. All employees were laid off effective October 25, 1996. The Complainants were among those laid off.

Rainbow almost immediately recalled some employees to assist in the dismantling and removal of the plant and its installation at another site. The Complainants were not among those so recalled.

The new plant site was considerably smaller than the Garden Village site. Naneff testified that it was clear that not all employees could be recalled. It appears that the new plant was fully operational and the recall was completed by late summer 1997. Naneff testified that the decisions with respect to which employees were to be recalled were made by the former plant manager, Myers, and the current plant manager, Dan Booth, as these two individuals possessed greater knowledge of the employees' work performance since they had actually worked alongside them. The Complainants were never recalled.

The Complainants allege that none of Rainbow's native workers were recalled. The Respondents' dispute this assertion.

(b) Commencement of Legal Proceedings

By February 11, 1997, the Employment Standards Branch of the Ministry of Labour had received claims from the Complainants under the *Employment Standards Act* R.S.O. 1990, c. E. 14, as amended (the "ESA"). By February 20, 1997, an Officer with the Human Rights Commission had contacted Naneff by telephone to advise that native workers had contacted the Commission and were alleging discrimination with respect to Rainbow's failure to recall them.

Between April 17 and 25, 1997, all six Complaints were signed. They were served upon the Respondents under cover of a letter dated May 1, 1997, at which time the Respondents were requested to file a response by June 1, 1997.

The Respondents immediately sought and obtained two extensions of time in which to file their response. They did not comply with new deadline of June 25, 1997. Indeed, they did not file their responses to the Complaints until December 9, 1999.

Commencing in October 1997, the Respondents contacted a private mediator with respect to having the employment standards claims and the Complaints jointly mediated. That mediation session occurred February 5, 1998. It was unsuccessful.

(c) Employment Standards Proceedings

Following the failure of the joint mediation session, Employment Standards Officer Jacqueline Amable investigated the employment standards claims. She issued her narrative report and Order to Pay on March 27, 1998. In it, she recounted and rejected various rationales proffered by Rainbow for its refusal to provide the Complainants with termination and severance pay. Essentially, the report records that Rainbow took the position that the Complainants' employment contracts had been frustrated by the blockade, and that they had all engaged in wilful misconduct and were thus not entitled to termination and severance pay. Amable also noted, and rejected, Rainbow's suggestion that its activities fell within federal rather than provincial labour jurisdiction. Although the Board notes that the contents of the Narrative Report are hearsay (but may nevertheless be admissible as containing prior inconsistent statements), regardless of the whether the contents are regarded as true, the Narrative Report does reflect that Rainbow and its personnel were asked to address in March 1998 the reasons for the refusal to provide the Complainants with termination and severance pay, and the rationale adduced is the same as the rationale now proffered for the refusal to recall them.

On May 11, 1998, Rainbow filed an application for review of the Order to Pay with the Ontario Labour Relations Board. With respect to the Complainants, the application for review was premised on the grounds that their contracts of employment had been frustrated, they had engaged in wilful misconduct, and the matter was outside provincial jurisdiction. With respect to the other employees to whom the Order to Pay required Rainbow to provide termination and severance pay, Rainbow's application for review was premised on the jurisdictional issue, as

well as on the fact that those persons could not be considered to have been terminated because they had been recalled to work within the timeframes set out in the *ESA*.

On May 21, 1998, Rainbow's Application for Review of the Order to Pay was dismissed without a hearing on the merits. The basis for the dismissal of the applications was Rainbow's failure to commence it within the statutorily prescribed time limits. Various other proceedings followed with respect to whether the Application for Review would be heard on the merits. Decisions in respect of this issue were released by the Ontario Labour Relations Board ("OLRB") on June 24, 1998, January 24, 2000 and February 21, 2000 and by the Divisional Court on September 28, 1999. The upshot of all these was that there never was a hearing of the Application for Review on the merits. When he testified before the Board, Naneff still appeared quite upset about this, particularly because he was required to pay termination and severance pay to persons who remained in Rainbow's employ.

(d) Human Rights Proceedings

Following the failure to resolve the Complaints through mediation on February 5, 1998, by letter dated March 17, 1998 the Commission again requested that the Respondents provide their response to the Complaints by March 31, 1998. Instead of doing so, the Respondents requested (by letter dated April 15, 1998) that the Commission exercise its discretion under s. 34 of the *Code* not to deal with the Complaints on the basis that they fell within federal rather than provincial jurisdiction.

The Commission apparently contacted the Respondents, seeking to have them abandon the constitutional jurisdictional issue, but they refused to do so (by letter dated June 22, 1998). It is unclear what the Commission did with respect to the section 34 request between June and November, but a letter dated December 1, 1998 from the Respondents to the Human Rights Officer enclosing information pertinent to the constitutional issue indicates that the Officer had contacted the Respondents in early November. The Commission's section 34 Case Analysis was completed on September 8, 1999, and provided to the Respondents on September 9, 1999. The

Case Analysis and concluded that the Complaints were within provincial jurisdiction and recommended that the Commission deal with them. The Respondents were invited to make submissions in response to the Case Analysis. The initial deadline of September 28, 1999 for making such submissions was extended until October 15, 1999 at the request of the Respondents. Those submissions were provided by letter dated October 14, 1999. By letter dated December 16, 1999, the Commission indicated that it would deal with the Complaints.

At the same time that the section 34 issues were being canvassed, an Investigation Officer with the Commission contacted the Respondents (by letter dated September 29, 1999) inviting them to provide information and documents relevant to the investigation of the merits of the Complaints by October 8, 1999, and to communicate their settlement expectations. On October 7, 1999, the Respondents replied, indicating that settlement discussions would be premature until such time as the issue of the Commission's jurisdiction (i.e. the section 34 issue) over the Complaints had been determined. This letter also did not appear to provide any of the requested information. By letter dated October 27, 1999, the Investigation Officer again made a request for information, and indicated that he was not prepared to defer the commencement of the investigation until the Commission had made the section 34 determination. The Respondents provided information pursuant to this request by letter dated November 25, 1999, and finally provided their formal responses to the Complaints on December 9, 1999.

The investigation into the merits of the Complaints which commenced in late 1999, was completed by January 27, 2000, when the section 36 Case Analysis was prepared recommending that the Commission refer the Complaints to the Board. Both Naneff and Myers were interviewed in the course of the investigation process, and a transcription of their witness statements provided to the Respondents for comment. A similar interview was held and witness statement prepared in respect of another Rainbow employee, Dan Booth. The Respondents availed themselves of the opportunity (by letters dated January 31, 2000 and February 1, 2000 respectively) to expand upon the witness statements of both Naneff and Myers. By letter dated February 28, 2000, they also made submissions respecting the section 36 Case Analysis.

Notwithstanding those submissions, the Commission decided in early April 2000 to refer the Complaints to the Board for hearing.

(e) Respondents' Defence on the Merits and the Supporting Evidence

At several points in the proceedings relating to the Corporate Respondent's failure to recall the Complainants, they have been called upon to explain the basis for the individual decisions not to recall. The Respondents' rationale for the decision not to recall each of the Complainants has been documented in writing in: the Narrative Report of the Employment Standards Officer dated March 27, 1998; the formal response to each of the Complaints filed with the Commission in December, 1999; the Investigation Officer's Witness Statements taken from Naneff, Myers and Booth; and the Corporate Respondent's correspondence expanding upon those Witness Statements; and their submissions dated February 28, 2000 on the Commission's Case Analysis Report.

As set out in each of the responses filed with the Commission, the Respondents state that all their decisions with respect to the recall of employees laid off as a result of the relocation of Rainbow's plant were made having regard to certain considerations:

The respondents state that the decision not to recall a number of employees when the new operation in North Bay opened was based on a number of factors. Specifically, the respondents considered the performance of each of the employees, the needs of the operation, and whether or not the employee had been involved in, or had concealed the plans for, the blockade of the respondent company's operation. The fact that the complainant was native was not considered by the respondents in their decisions not to recall him.

Furthermore, as indicated by Myers in his Witness Statement (and in his *viva voce* evidence before the Board), the decisions about which employees to recall were made jointly by him, and Booth, and included the input of another employee named Steve Marshall. In his

Witness Statement, Naneff also stated that the decisions with respect to which employees to recall were made by Myers and Booth. Booth, in his Witness Statement, was able to indicate the basis on which employees were recalled to work on the plant relocation, and also the basis on which others were later recalled when the plant was operational.

In their February 28, 2000 submissions on the Commission's Case Analysis Report, the Respondents did not suggest that the recollections of Naneff, Myers and Booth were other than clear with respect to the recall protocol and criteria, and the specific reasons for not recalling each Complainant. Furthermore, the Respondents suggested that the investigation had been commenced and concluded in a hasty manner "in the face of clear indications from the Respondent [sic] that there was other information of importance for the investigator to review, and an important native witness for the Respondent that would provide, *inter alia*, information regarding relations between the company and the First Nation".

Below the Board sets out, for each Complainant in turn, the Respondents' articulations of their rationale for not recalling him as those rationales appear in the Narrative Report, the responses, and the Witness Statements. The Board has not made specific reference to the correspondence from Rainbow's counsel to the Investigating Officer, which purports to correct and supplement the Witness Statements. Suffice it to say that they contain some additional information from each of the witnesses with respect to the performance issues related to the Complainants (or some of them).

Maurice Commanda

The Officer's Narrative Report indicates that Rainbow told her that Maurice Commanda had not been recalled because his son Bernie's wife was a Band Council member and she had voted "to shut Rainbow down". In fact, it was Maurice's own wife (and Bernie's mother) who was the member of Band Council, as the response indeed indicates:

The primary reason that the complainant was not recalled was because of poor performance. In particular, a number of the respondent company's employees had indicated to management that they did not wish to work with the complainant. An incident occurred on 16 October, 1996 during which the complainant accused a fellow employee, Brian Bellefeuille of making a mistake in his work. As a result of the confrontation, the complainant's son became involved and threatened to hit Mr. Bellefeuille. The complainant was counselled to improve relations with other employees during a counselling meeting with Dan Booth on 17 October, 1996. Unfortunately, Mr. Bellefeuille elected to resign as a result of the difficulties he had with the complainant and his son.

The complainant often did not comply with basic safety rules of the respondent company.

The complainant knew that the blockade was going to occur, as his wife sits on Band Council. The complainant failed to inform the respondent company that the blockade, which would have grave effects on the respondent company's operations, would occur. The respondent company considered this conduct a breach of the complainant's duties of loyalty and fidelity to the company. The respondent company had, in the past, tolerated the complainant's poor performance and misconduct so as not to jeopardize relations with Band Council, given the relationship of the complainant with a council member.

Myers' Witness Statement indicates that he was asked why Maurice Commanda was not recalled and indicated that the "biggest thing" was that other employees had a hard time working with him and that "safety was a big concern when other employees were working with Maurice". The only employee he could actually name who had difficulty with this Complainant was Brian Bellefeuille, nor could he recall anything specific about the Complainant's alleged failure to follow safety rules. He also acknowledged that he was not responsible for disciplining this employee because he was not production manager at the time and that Booth would have more knowledge of Maurice Commanda's performance issues. Myers further indicated that he had never made a practice of recording discipline he himself had meted out. Finally, he indicated that he never made any inquiries of this Complainant as to his knowledge of, or involvement in, the blockade.

In his Witness Statement, Naneff indicated that he worked out of Rainbow's office in Sudbury. He suggested that a question respecting this Complainant's alleged failure to comply

with safety rules should be asked of Dan Booth. His counsel suggested to the Investigating Officer that a list of the employees who allegedly did not want to work with this Complainant would be better put to Myers.

By contrast to the above two Witness Statements, Booth's Witness Statement indicates with some precision the nature of the safety infractions this Complainant is alleged to have committed, as well as the extent of, and reasons for, his alleged difficulty in working with other employees.

Bernie Commanda

The Officer's Narrative Report indicates that Rainbow told her that Bernie Commanda had not been recalled because his wife was a Band Council member and she had voted "to shut Rainbow down". As noted above, it was actually Bernie's mother (and Maurice's wife) who was a member of Band Council. Again, the response filed with the Commission in respect of Bernie Commanda's Complaint makes this clear:

The primary reason that the complainant was not recalled was because of poor work performance. In particular, a number of the respondent company's employees had indicated to management that they did not wish to work with the complainant. An incident occurred on 16 October, 1996 during which the complainant threatened to hit Brian Bellefeuille. The complainant promised to improve relations with other employees during a counselling meeting with Dan Booth on 17 October, 1996. Unfortunately, there was a further incident on 23 October, 1996, during which the complainant threw concrete in Mr. Bellefeuille's face. Mr. Bellefeuille elected to resign, rather than to continue to tolerate the complainant's conduct.

The complainant had been warned about being rude with the respondent company's customers. The complainant had been removed from a forklift operator position for this reason.

The complainant knew that the blockade was going to occur as his mother sits on Band Council. The complainant failed to inform the respondent company that the blockade would occur. The respondent company considered this conduct a breach

of the complainant's duties of loyalty and fidelity to the company. The respondent company had, in the past, tolerated the complainant's poor performance and misconduct so as not to jeopardize relations with Band Council, given the familial relationship of the complainant with a council member.

When asked about the reasons for not recalling Bernie Commanda, Myers' Witness Statement reflects that he had no knowledge of any poor performance on the part of this Complainant prior to 1996, and that all disciplinary measures taken against him had been taken by Booth. He also stated that at the time the decisions to recall were made he had no knowledge of any "verbal concerns" with respect to this employee. Myers did not ask this employee about his knowledge of or involvement in the blockade.

Naneff indicates in his Witness Statement that there had been concerns about this Complainant being rude to customers that had been brought to Naneff's attention by Booth. He also said there was an ongoing concern with the performance of all the Complainants, but that he could not "give specifics" and that management had "looked the other way".

In his Witness Statement, Booth described this Complainant as "a real problem employee" and provided examples of his treatment of customers, and referred to customer complaints about him.

Robert Commanda

The Employment Standards Officer's Narrative Report does not appear to deal with any claim made by Robert Commanda. The response filed with the Commission sets out the following reasons for the failure to recall him:

The primary reason that the complainant was not recalled was because of his history of poor performance. The complainant had received a number of verbal warnings about being late for work and the quality of the building molds that he constructed.

The respondent company was also very concerned that the complainant did not advise the respondent company that there was going to be a blockade of the company's operation. The respondent states that the complainant knew that the blockade was going to occur as his mother sits on band council. The respondent company considered this failure to inform the company of a blockade that would have grave effects on the company's operation, a breach of the complainant's duty of loyalty to the company. The respondent company had, in the past, tolerated the complainant's poor performance and misconduct so as not to jeopardize relations with Band Council, given the familial relationship of the complainant with a council member.

His Witness Statement records Myers as having responded as follows when asked why this Complainant was not recalled: "paragraph 8 of the response says because of poor work performance, quality of building molds, etc. I guess that is it". Myers also indicated that he never asked this Complainant about his knowledge of, or involvement in, the blockade, nor did he have any knowledge of any verbal warnings he had received.

For his part, Naneff, in his Witness Statement did not respond to questions about being late or quality of building molds. Further, he did not recall asking this Complainant about his involvement in or knowledge of the blockade.

In his Witness Statement, Booth was able to articulate clearly what problems had occurred with respect to this Complainant's performance as both a constructor of molds and as operator of another machine. He also indicated that another reason for not recalling this Complainant, particularly for the purposes of the relocation, was that he required a great deal of supervision. Booth also acknowledged that he bore responsibility for the lack of written disciplinary notices with respect to all the Complainants. Booth appeared, however, to have recollection of this Complainant's performance without resort to such records.

Doug Chevrier

The Employment Standards Officer's Narrative Report indicates that Rainbow advised the Officer that Doug Chevrier had not been recalled because he was a Band Council member

and had voted “to shut Rainbow down”. This rationale is repeated in the response filed with the Commission:

The primary reason that the complainant was not recalled was because he was a member of the Band Council that authorized a blockade of the respondent company’s operations.

The complainant was aware that the blockade was going to occur, but failed to inform the respondent company. The respondent company considered this conduct a breach of the complainant’s duties of loyalty and fidelity to the company.

The only comment in Myers’ Witness Statement with respect to this Complainant is, “Doug Chevrier – I can’t say too much about him – didn’t work for me – I have a hard time remembering him”.

In his Witness Statement, Naneff was asked a question about the extent of this Complainant’s obligation to inform Rainbow of a decision of Band Council that might affect it. Respondents’ counsel in fact answered the question by saying that this Complainant was obliged to advise Rainbow of a Band Council decision that would have a direct and adverse impact on Rainbow’s operations.

Booth indicated in his Witness Statement that this Complainant was probably Rainbow’s most junior employee and was not a permanent employee. Booth also specifically recalled the nature of the work that this Complainant had been performing at the time of the layoff, and stated that it would not have warranted his being recalled for the relocation.

Gilbert Anishnabie

The Employment Standards Officer’s Narrative Report states that Rainbow advised her that Gilbert Anishnabie had not been recalled because he was suspected of falsely reporting to the Band Council that Rainbow had not paid its bills and otherwise making derogatory remarks

about Rainbow to the Band Council and the Community. Similar assertions are contained in the response filed with the Commission in respect of this Complaint:

The primary reason that the complainant was initially not recalled was because of incidents that occurred shortly before his lay off. The complainant had been found going through confidential paperwork of the respondent company relating to the price being paid for stone used for precast concrete and other products. As a loader operator, the complainant had no authority to review this confidential paperwork.

The respondent company was also aware that the complainant had told employees of the company and members of the community that the respondent company was "stealing" from the First Nation. This allegation was completely false, and the respondent company considered this conduct a breach of the complainant's duties of loyalty and fidelity to the company.

The respondent company was not happy with the complainant's performance. The complainant had a practice of treating the respondent company's equipment roughly, to the extent that the equipment required more frequent maintenance.

In his Witness Statement, Myers indicated that he had been told that this Complainant was going through company paperwork and that he had done nothing (and had told no one) about it since it could have been related to the Complainant's job. In any event, Myers indicated that the Complainant's looking through paperwork had nothing to do with the decision not to recall him. Myers could not recall who had told him that the Complainant had said Rainbow was stealing from the First Nation. With respect to the allegation that the Complainant treated equipment roughly, Myers said that the Complainant drove too fast around the property and indicated that he had warned him verbally about it, but did not reduce the warning to writing because "I guess I didn't think it warranted a written warning".

In his Witness Statement Naneff indicated that he had known for about two years prior to the layoff that this Complainant had been going through the company's paperwork, but that he had not been disciplined for "political reasons" because he had friends on Band Council. Naneff also indicated that his evidence respecting the Complainant's passing along of information to the Band Council came out in discussions with the Band itself. With respect to the allegation about

treating equipment roughly, Naneff suggested that Booth would be able to provide the particulars.

Booth's Witness Statement indicates that he informed his supervisor that this Complainant was going through paperwork, but that Booth himself did not take any disciplinary action in respect of this behaviour. Booth did recall taking disciplinary action in the form of both a verbal and written warning with respect to the rough use of equipment. He also recalled that employees at the Ready-Mix plant had told him that this Complainant had made accusations that Rainbow was "stealing", but he could not recall specifically which employees had told him so.

John Goulais

The Officer's Narrative Report indicates that Rainbow did not give her a reason why the Complainant John Goulais was not recalled. The response filed with the Commission in respect of his Complaint provides:

The primary reason that the complainant was not initially recalled was because he had accused the respondent company of stealing from the First Nation. The respondent company considered this conduct a breach of the complainant's duty of loyalty and fidelity to the company. Notwithstanding this breach, the respondent company decided to recall the complainant . . . and the complainant declined the offer.

The complainant was often not available for work because he operated a chip wagon business.

Myers' Witness Statement indicates that he knew nothing about the Complainant's alleged accusations of stealing, and that the only aspect of his performance that was problematic was that he was often unavailable on Mondays and Fridays due to his other business.

From his Witness Statement, it does not appear that Naneff was able to provide much more information about why this Complainant was not recalled. With respect to the allegations that the Complainant had accused Rainbow of stealing, and with respect to the operation of the

chip wagon, he indicated that Myers should be asked for particulars. When asked whether this Complainant's performance influenced the decision not to recall him initially, Naneff said: "it's all part of it – it's not one thing or another – it was the whole environment".

In his Witness Statement, Booth indicated that he had selected this Complainant for recall for the plant relocation, but that Myers and Naneff had made the decision not to recall him at that time. Booth had no knowledge that this Complainant had made any accusations that Rainbow was "stealing" from the First Nation.

(f) the Affidavits and Testimony in Support of this Motion

In his Affidavit sworn April 4, 2001, Naneff asserted the following at paragraph 17:

Due to the delay of in excess of three years between the incidents and the investigative interviews held with the individual Respondents and witnesses, I am concerned that the memories of those who would give evidence at the hearing of this matter, have faded to the extent that they will be unable to recall some of the specific details of what occurred in October 1996.

During the course of his cross-examination by the Commission, Naneff acknowledged that:

- The chronology of events respecting the Employment Standards Claims and these Complaints as set out in the Commission's documents brief (which is essentially what the Board has set out above in this decision) was correct;
- He met with former counsel, Weaver Simmons, in May 1997 to compile documents pertinent to the Complaints and to go over what had happened, and that he met with current counsel in June 1997;
- Evidence exists for all the reasons for termination set out in Rainbow's Application for Review of the Employment Standards Officer's Order to Pay (which the Board notes relates to knowledge of and involvement in the blockade);
- Evidence exists to support Rainbow's assertion that some of its native Canadian employees were recalled;

- Evidence exists to support the reasons articulated for not recalling the Complainants, in the form of testimony from the managers who worked with the employees on a daily basis; and
- The Respondents in their responses had articulated the defences particular to each Complaint in great detail.

In the course of his re-examination, Naneff indicated that Steve Marshall, a former Rainbow employee with knowledge of the conduct in which the Complainant Gilbert Anishnabie was alleged to have engaged, was no longer employed by Rainbow and was now working for one of its competitors. Naneff did not indicate that Marshall was not available to testify.

In his Affidavit sworn April 4, 2001, Myers asserted that he had difficult remembering the events of October 1996.

I was the manager of the North Bay plant prior to Dan Booth, who became manager of the North Bay plant during the summer of 1996. In October 1996, I still had some responsibility for the North Bay operation.

On December 21, 1999, I was interviewed by telephone by Mr. Rajan, the investigator employed by the Human Rights Commission. During the interview, Mr. Rajan asked me a number of questions about the individual complainants. I found it very difficult to remember what happened in October 1996, given that he was asking about events that had occurred more than three years previously. In fact, I had difficulty remembering one of the complainants, Mr. Chevrier.

During the course of his cross-examination by the Commission, however, he acknowledged that:

- He recalled meeting with Weaver Simmons to go over what had happened in October 1996, and also thought he had met with current counsel to discuss the same matters;
- He had not sought to obtain from either counsel any copies of interview notes they may have been made during the course of the discussions referred to above;

- Current counsel consulted with him in drafting the responses to the Complaints that were filed with the Commission;
- He was no longer employed at the plant when the layoff occurred in October 1996;
- He had been able to respond to the questions posed by the investigating officer and supply reasons for why the Complainants Maurice Commanda, Robert Commanda and John Goulais were not rehired;
- With respect to the Complainant John Goulais' alleged unavailability for work, that evidence was supported by his time cards;
- Booth had had more involvement with the Complainant Bernie Commanda;
- Steve Marshall had more knowledge of the reasons for not recalling the Complainant Gilbert Anishnabie;
- He had never worked with the Complainant Doug Chevrier; and,
- He had reviewed the Witness Statement prepared by the investigating officer and provided counsel with certain clarifications of what was set out in that Statement.

Naneff swore to a Supplementary Affidavit dated August 23, 2001. It asserts that Myers is not available to testify at the hearing because he died on May 25, 2001. The Supplementary Affidavit further asserts that Booth is no longer employed by Rainbow, but "would still be able to testify at the hearing" although "he is significantly less available now". The Supplementary Affidavit then goes on to set out the consequences Naneff asserts that Myers' death has on the Respondents' ability to defend against the Complaints.

5. In addition to Mr. Myers being a respondent in the complaint of Mr. Robert Commanda, Mr. Myers and Mr. Booth were the management personnel who selected the employees to be recalled from layoff as a result of the shutdown of operations at the reserve site and the reopening of the much smaller North Bay operation. Given the size of the new location, it was not possible to continue the employment of those employees who had been employed at the reserve location. Accordingly, it was necessary to select only those employees who had the highest level of skills and abilities as employees. The decisions regarding who should be recalled and who should not be recalled necessarily involved the experience of

both Mr. Myers and Mr. Booth with respect of [sic] each of the complainants, as well as the employees who were recalled. In these circumstances, the corporate knowledge of the corporate Respondent and its ability to give evidence in defence of the allegations has been significantly compromised, particularly as a result of the death of Mr. Myers.

6. During cross examination of Mr. Myers on his Affidavit in support of the Motion, he admitted making a statement attributed to him by one of the complainants, Mr. Robert Commanda. Mr. Myers admitted saying "I don't know if we'll have a plant for you to work in". While the Respondents deny that the statement was discriminatory and I think the statement was related to the inability of the company to employ all the employees at a much smaller location, Mr. Myers will be unable to respond to or rebut any evidence adduced by the Commission or Mr. Robert Commanda tending to show that the statement was discriminatory. Similarly, to the extent that this evidence might tend to support the Commission's case against the other respondents, the other Respondents have been denied the opportunity of adducing contrary or rebutting evidence from Mr. Myers.

7. Mr. Myers had been promoted to the position of General Manager of the corporate Respondent in 1996. He had previously been manager of the North Bay operation. Accordingly, in October 1996 when the layoffs occurred, he was in the best position to assess the relative merits of the various employees of the Respondent at the reserve location. Mr. Dan Booth, who had recently taken over as manager of the North Bay operation, assisted Mr. Myers in determining which employees to recall.

8. While it is my view that the delay of in excess of three years between the incidents and the investigative interview held with Mr. Myers by the Commission significantly reduced Mr. Myers' ability to recall the events of October 1996, his death obviously has eliminated his ability to testify, and the Respondents' ability to rely on this evidence in its defence to the complaints.

9. I believe that the death of Mr. Myers has compromised the ability of the remaining Respondents to adequately respond to the complaints at a hearing of this matter. As the Respondents could have relied upon Mr. Myers' evidence had this matter been brought to a hearing within a reasonable period of time, I believe it is the Commission's delay in investigating this matter and proceeding to a hearing that has resulted in the Respondents' inability to mount a full and complete defence.

The Commission did not cross-examine Nanef on his Supplementary Affidavit.

THE PARTIES' POSITIONS

(i) The Respondents' Position

When this motion was originally heard at the end of April, 2001, the Respondents' counsel briefly summarized his clients' position. He noted that three and one-half years had elapsed from the filing of the Complaints until the first day of hearing, and submitted that:

- this delay was inordinate by any standard;
- this delay was inordinate in the context of these particular Complaints; and
- the consequences of the delay were that the Respondents were prejudiced in their ability to defend against the Complaints.

Counsel also took the position that the Commission's failure to provide reasons for its decision to refer the Complaints constituted an abuse of process.

In the written submissions filed on behalf of the Respondents following Myers death and the filing of the Supplementary Affidavit of Naneff, counsel took the position that Myers was a Respondent and a key witness, whose death prejudiced the ability of the Respondents to mount an effective defence.

(ii) The Commission's Position

In his oral submissions at the conclusion of the argument on this motion in late April 2001, Commission counsel took the following positions:

- Fairness does not require the Commission to give reasons for its decision to refer a case to a Board of Inquiry for full hearing;
- Delay in and of itself does not constitute an abuse of process, absent accompanying prejudice;
- In assessing prejudice, the Board must consider whether the Respondents availed themselves of the opportunity to preserve evidence; and

- The Respondents have not demonstrated actual prejudice of such magnitude to warrant summary dismissal for abuse of process.

In his written submissions dated October 24, 2001, Commission counsel asserted that the motion should still be dismissed notwithstanding the death of Myers, for the following reasons:

- Myers was a named Respondent in only the Complaint of Robert Commanda and the Commission had consented to an order removing Myers as a Respondent in any event, and would not seek a remedy against him or his estate;
- Myers had admitted under oath to having made the comment attributed to him in Robert Commanda's Complaint, which constituted the only mention of him in that (or any other) Complaint;
- With respect to Rainbow's rationale(s) for not recalling the Complainants, the validity of those rationales could be proven through documentation or the testimony of other witnesses;
- There had been no evidence led to establish that the testimony of those other witnesses would be insufficient for this purpose; and
- Consequently, Rainbow was not prejudiced by proceeding in circumstances where Myers was not available to testify.

(iii) Reply Submissions

Rainbow's counsel responded to the Commission's submissions, taking the position that removing Myers as a Personal Respondent to the Complaint of Robert Commanda did not alleviate the prejudice that this death would cause to the other Respondents in their defence against the Complaints. Once again, counsel emphasized that Myers was a key witness, and noted that he had not previously been examined under oath with respect to the merits of the Complaints.

THE ANALYSIS

(i) Introduction

In *Anonuevo v. General Motors of Canada Ltd.*, [1998] O.H.R.B.I.D. No. 7, the Board dealt extensively with its previous jurisprudence respecting abuse of process motions. The Board has subsequently released *Chan v. Ontario Power Generation Inc.*, [2001] O.H.R.B.I.D. No. 7; *Jeffrey v. Dofasco Inc.*, [2001] O.H.R.B.I.D. No. 8; and *Bui v. B & G Foods Inc.*, [2001] O.H.R.B.I.D. No. 25, also dealing with motions to dismiss for abuse of process. The Board takes *Anonuevo*, *supra*, as its starting point for the analysis in the present case, and some of the paragraphs that follow have been lifted in their entirety from that decision. Where appropriate, *Chan*, *Jeffrey*, and *Bui* are also referred to.

(ii) What is Abuse of Process?

Generally speaking, an abuse of process occurs where the party asserting a claim for which it seeks a judicial remedy fails to conduct him or herself with the expected propriety, thereby impairing the ability of the person defending the claim to do so effectively, with the result that the integrity of or public respect for the decision maker would be undermined should the proceeding be allowed to continue. The doctrine is applicable in civil and criminal proceedings.

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits . . . but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court . . . It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. (*R. v. Conway* (1989), 49 C.C.C. (3d) 289 at p. 302 (S.C.C.))

See also *Lasani v. Ontario (Ministry of Community and Social Services) (No.1)* (1993), 21 C.H.R.R. D/412 at para. 11(Ont. Bd. Inq.; and *Jeffrey, supra*, at para. 12.

(iii) Legal Principles Respecting Abuse of Process

The Board of Inquiry has jurisdiction to dismiss or stay permanently a proceeding before it where to do otherwise would constitute an abuse of process. See *SPPA s. 23(1)*; *Hollis Joe v. Ontario Human Rights Commission* (1995), 25 C.H.R.R. D/472 and cases cited therein at para. 54(Ont. Bd. Inq.); and *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Gen. Div.).

Abuse of process may be found where improper conduct occurs at either the litigation or the investigation stage of a proceeding. See *Patel v. Minto Developments Inc. (No.2)* (1996), 26 C.H.R.R. D/444 (Ont. Bd. Inq.); and *Schofield v. Oshawa General Hospital* (1993), 20 C.H.R.R. D/391 (Ont. Bd. Inq.).

The jurisdiction to dismiss or stay for abuse of process should be exercised cautiously and only in the clearest of cases, particularly in view of the serious consequences to the complainant who usually has no access to another forum in which to assert his or her claim. See *Gohm v. Domtar Inc. (No. 1)* (1989), 10 C.H.R.R. D/5968 at para. 43199(Ont. Bd. Inq.); and *Seneca College v. Bhadauria* (1981), 2 C.H.R.R. D/104 (S.C.C.).

The Board of Inquiry has no supervisory jurisdiction over the Commission. The Board may, however, be required to assess what lasting impact the Commission's handling of a case has had on the fairness of the proceeding before it and particularly on the ability of a respondent before the Board to make full answer and defence to the allegations against it:

In my view, a board of inquiry has no general authority under the Code to determine if the jurisdictional prerequisites to the establishment of a board of inquiry have been satisfied. That responsibility lies with the courts -- either on judicial review or a motion to quash the appointment of the board of inquiry. Instead, it is only when a procedural error or omission, which cannot be rectified, amounts to an abuse of process, that a board has the authority to address the matter.” (*Hollis Joe v. Ontario Human Rights Commission, supra*, at para. 30)

See also *Ontario College of Art v. Ontario Human Rights Commission* (1993), 11 O.R. (3d) 798 at p. 800 (Div. Ct.).

Where the unfairness complained of in the Commission’s handling of the matter can be rectified by an order of the Board, such order will issue, but the proceeding will not be stayed. For example, in some circumstances the unfairness consequent upon a failure to provide particulars in a timely way may be rectified by the Board of Inquiry ordering their production and adjourning the proceedings pending their delivery. See *Jack v. Metro Toronto Reference Library* (1994) 22 C.H.R.R. D/158, at paras. 37, 38 (Ont. Bd. Inq.); *Clinton v. Ontario Blue Cross (No.1)* (1993), 18 C.H.R.R. D/375 at para. 7 (Ont. Bd. Inq.). But see *contra, Hollis Joe, supra*, at para. 80.

The mere fact that the Commission has been dilatory in its investigation or litigation of the complaint is not sufficient to constitute abuse of process. The respondent must demonstrate that it has suffered some actual substantial prejudice as a consequence of the delay. Contrary to earlier jurisprudence, a respondent need not show that it is impossible to ascertain the facts:

The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing. (*Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 at para. 16 citing *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.))

The Supreme Court of Canada’s decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43 affirmed the principle that to constitute an abuse of process the delay in question must have caused sufficient prejudice to bring the human rights system into disrepute.

In some circumstances, it will not be possible to assess at the outset the degree of prejudice that the respondent has suffered. In those cases, adjudicators have held that the appropriate course is to refuse to dismiss; to commence hearing the evidence on the merits; to entertain a subsequent motion to dismiss if necessary; to make any rulings possible to alleviate the prejudice that does exist; and to take the fact of delay into account in considering what weight to give the evidence. For examples of this approach, see *Aziz Chowdhury v. F.C. Israel* (unreported) (July 5, 1995, Ont. Bd. Inq.); *Crane v. McDonnell Douglas Canada Ltd.* (1993), 19 C.H.R.R. D/422 (Ont. Bd. Inq.); *Morin v. Noranda* (1988), 9 C.H.R.R. D/5245; *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425 (Ont. Bd. Inq.); and *Chan, supra*, at para. 29.

In exercising its jurisdiction to dismiss a complaint for abuse of process pursuant to section 23(1) of the *SPPA*, the Board is exercising its discretion. Consequently, it is appropriate for the Board to consider whether the respondent's own actions have contributed to the delay or have prejudiced its ability to defend against the complaint, including whether it availed itself of the opportunity to have witnesses record their memories while they were fresh (See *Blencoe, supra*; *Lasani, supra*; *Joe, supra*; *Vogue Shoes, supra*; and *Shreve v. Windsor (City) (No. 2)* (1993), 18 C.H.R.R. D/363 (Ont. Bd. Of Inq.)).

(iv) Elements of a Code Contravention and Stated Defence

In order to determine whether proceeding to hear the Complaints would occasion an abuse of process, the Board must consider the elements of the alleged contraventions and the proffered defences. They may be simply stated. The Complainants allege that Rainbow failed to recall them to work following the layoff because of their native ancestry. Rainbow states that the Complainants' ancestry played no role in the recall decision. Rainbow takes the position that the Complainants did not perform work that was required or would be of assistance in the plant relocation, and that the decision not to recall them after the plant had been relocated was informed by the facts that Rainbow's operations were smaller, fewer workers were required, the Complainants had a history of

poor work performance and/or Rainbow suspected that they knew of or were involved in the blockade.

(v) Commission's Failure to Give Reasons for Referral

Prior to referring these matters to the Board, the Commission offered the Respondents the opportunity to review the Case Analysis Reports. The Case Analysis Report relating to the Complaint of Maurice Commanda was included in the Commission's brief of documents filed on this motion. The Board presumes that it was typical of such reports prepared in respect of the other Complaints. It included a recommendation that the matter be referred to the Board and the reasons for that recommendation. The Respondents were provided with an opportunity to make submissions on the Case Analysis Reports and availed themselves of the opportunity to do so. The proceedings before the Board are conducted in accordance with the *Code*, the Board's *Rules of Practice*, and the *SPPA*. The Board must proceed in a manner consistent with both fairness and natural justice. It convenes a hearing *de novo* and requires that all parties serve and file pleadings, disclose documents on which they rely, and produce a list of witnesses and a summary of their expected testimony. Witnesses are subject to both examination in chief and cross-examination. The Board's final decision is itself subject to appeal.

In view of the above, the Board does not consider that the Commission's failure to provide reasons for its decision to refer this matter to the Board constitutes in and of itself, or contributes to, any abuse of process. The Respondents have not established in evidence that they have been prejudiced by the lack of reasons.

(vi) Quality of Evidence

The Respondents have not asserted or proven that any documentary evidence has been lost as a result of the delay between the date of these Complaints and their referral to the Board.

They have asserted with respect to Myers that he was a key witness, that his recollection of events had faded as a result of the passage of time, and that his subsequent death has deprived the Respondents entirely from relying on the testimony he might have proffered.

The Board acknowledges that Myers was involved in making the decisions not to recall the Complainants. Had he been available to testify, the Board would have expected him to be called as a witness to provide whatever direct evidence he could about the reasons why they were not recalled. Having regard to the contents of his Witness Statement, the Board notes that he does not appear to have claimed to ever have had any direct knowledge of the Complainants' involvement in the blockade.

With respect to the suggestion that as a result of the Commission's delay in referring this matter, Myers memory had faded, thereby prejudicing the Respondents, the Board notes that the Respondents never suggested that this was the case prior to the referral of these matters to the Board. Indeed, upon reviewing his Witness Statement, Myers was able to provide Respondents' counsel with additional information and clarifications, which were included in correspondence to the investigating officer. As well, in his submissions on the Case Analysis Reports, Respondents' counsel referred to the recollection of those witnesses interviewed as "clear", writing for example with respect to the Complaint of Robert Commanda:

While the memory of the three management employees interviewed may have faded somewhat in the three years between the incidents discussed and the interviews that were held by the investigator, the Respondent submits that the answers consistently reflect the process employed, given the governance model employed by the Respondent. The front line manager, Mr. Booth, quite rightly indicated that the ultimate responsibility

for decision-making lies with the owners, including Mr. Naneff. The middle manager, Mr. Myers, rightly described a participatory decision-making process. Mr. Naneff indicated that he relied on the lower-level management employees in respect of the decision to be made. All agreed with Mr. Booth's description of the sequence of events.

In any event, the Board agrees with the Commission's submission that the mere fading of memory does not constitute sufficient grounds for a finding of abuse of process and summary dismissal, where the Respondents have not availed themselves of the opportunity to preserve the evidence by having those witnesses record their memories while they were fresh. Such records could, of course, have been subsequently relied on to refresh their memories. In this case, the Complaints were brought to the Respondents' attention within six months of the initial layoff and recall, and several months before the final recall. Proceedings with respect to the claims of these Complainants in one or another forum have been ongoing almost continuously since that time.

All of the documents generated by the Respondents prior to the referral of this matter, the Witness Statement of Myers, his cross-examination before this Board in April 2001, and Naneff's cross-examination before the Board at the same time, indicate that he was not the only decision maker. The passage set out above from the submissions on the Case Analysis Report respecting Robert Commanda's Complaint reflects this position as well. The other decision makers identified were Naneff and Booth. Both are available to testify before the Board at a hearing into the merits of these Complaints.

Earlier in this decision, the Board set out in some detail what the various documents, including the Witness Statements, indicate about the extent of Myers' direct knowledge with respect to the individual performance rationales for not recalling the Complainants. The Board's review of these materials reveals that other witnesses who remain available to testify were conceded to have equivalent or superior direct knowledge in respect of the work performance issues of all the Complainants with the exception of John Goulais. In the case of this Complainant, however, it was indicated that the concern about his absenteeism and availability for work could be established through documentary evidence in the form of his time cards.

With respect to the statement attributed to Myers in the Complaint of Robert Commanda, and which Myers subsequently admitted to having made, the Board is of the view that there may be some slight potential prejudice to the Respondents occasioned by Myers' inability now to testify as to the context in which that statement was made, and the message he intended to convey with those words. To a large extent, the determination of whether Myers' inability to respond in fact prejudices the defence will depend on the nature of the evidence adduced by the Complainant. In other words, it is not entirely clear at this time to what extent the case will turn on this statement. Whether to admit testimony about it, and what weight to give to that testimony and the admission, are matters that may be raised with the panel hearing these Complaints on their merits, and any prejudicial impact may be rectified at that point. The slight potential that the admission will have a prejudicial impact does not warrant the outright dismissal of any of these Complaints.

The Board concludes that the Respondents have not established that they have suffered actual prejudice in respect of their ability to defend against these Complaints as a consequence of the passage of time.

(vii) Respondents' Conduct

The Respondents did not file their responses to these Complaints with the Commission until more than two years after the incidents complained of. They resisted filing those responses and having the Commission open its investigation until after the question of federal/provincial jurisdiction had been determined, even though their position with respect to that matter stood little chance of succeeding having regard to the Supreme Court of Canada's decision in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

As noted above, the Respondents do not appear to have taken the opportunity to preserve relevant evidence at the earliest opportunity by requiring their material witnesses to make notes respecting their recollection of events related to the layoff and the two stages of the recall.

Had the Board not specifically found that the Respondents have not been significantly prejudiced by the delay between the Complaints and their referral to the Board, it would in any event have dismissed this motion on the basis that any prejudice that did exist was largely the result of the Respondents' own conduct.

OUTSTANDING ISSUE

As the Board has noted, there is an outstanding issue between the parties with respect to the status of the Personal Respondents.

Respondents' counsel should clarify to the Commission, the Complainants and the Board forthwith if Rainbow is prepared to provide the undertaking sought by the Commission and set out at page 2 of this decision.

If such undertaking is not forthcoming, the Commission is requested to advise the Board and the other parties if it consents to an order removing the Personal Respondents in any event.

If the Commission does not consent to the removal of the Personal Respondent Myers, it should take the appropriate steps to have the Complaint of Robert Commanda amended to reflect that the estate of Myers is the proper Personal Respondent.

Dated at Toronto, this 25th day of January, 2002.

Mary Anne McKellar
Vice-Chair

